NO. 10-546

IN THE
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY, *et al.*,

Petitioners,

v.

COUNTY OF SANTA CLARA, *et al.*,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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November 26, 2010

QUESTION PRESENTED

Whether contingency fee prosecutors' direct, personal, and substantial pecuniary interest in the outcome of a civil government prosecution for "public nuisance," brought "in the name of the People of the State of California" seeking to vindicate sovereign interests, and which seeks abatement of lead paint from hundreds of thousands of public and private buildings in California at a potential cost of billions of dollars, violates the Due Process Clause of the Fourteenth Amendment.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, *amicus* states that it is a Pennsylvania not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.3(b), Atlantic Legal Foundation respectfully requests leave of the Court to file this brief *amicus curiae* in support of Petitioners.

Written consent to the filing of this brief has been granted by counsel for the Petitioners. Counsel for Respondents have not responded to Amicus' request for consent, necessitating the filing of this motion.

Dated: November 26, 2010

Respectfully submitted,

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INTEREST OF *AMICUS*[1]

The Atlantic Legal Foundation is a non-profit, non-partisan organization with a history of advocating limited, effective government, free enterprise, individual liberty, school choice, and the use of sound science in judicial and regulatory decision-making. Collectively, the Foundation's Board of Directors and Advisory Council have hundreds of years of experience with responsibility for business-related legal counsel and litigation at major corporations and law firms. The Foundation seeks to advance these goals through litigation, public advocacy, and education. Atlantic Legal provides *pro bono* legal representation to individuals, corporations, trade associations, and similar groups. Atlantic Legal Foundation has appeared in this Court and in numerous federal and state appellate courts as an *amicus*, as counsel to *amici*, and as counsel to a real party in interest. The Foundation's Board of Directors includes current and former General Counsels of eighteen major corporations: American Cyanamid,

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[1] In accordance with Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) counsel for *amicus* provided the requisite 10-day to counsel for the parties. Counsel for petitioner has consented to the filing of this brief; counsel for respondents have not responded to *amicus*' request for consent.

American International Group, Inc., Becton, Dickinson and Company, Bethlehem Steel Corporation, Computer Sciences Corporation, Contessa Premium Foods, CPC International Inc., Crane Co., DuPont Co., FMC Corporation, GT Solar International, Johnson & Johnson, Lockheed Martin Corporation, Monsanto, Republic National Bank of New York, Rohm and Haas Company, and Tyco International Limited.[2] Other members of the Foundation's Board of Directors and Advisory Council have substantial responsibility for business litigation at major law firms. The Foundation has been involved in cases significant to the business community and has been recognized for its advocacy of issues that deserve responsible analysis and study.

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[2] Pfizer Inc., the parent company of one of the Petitioners, has made financial contributions to the Atlantic Legal Foundation for general operating support for more than 30 years; Pfizer Inc.'s contribution in 2009 (the last complete fiscal year of the Foundation) amounted to less than 5% of Atlantic Legal Foundation's annual revenue. Petitioner E.I. du Pont de Nemours and Company ("DuPont") has made financial contributions to Atlantic Legal Foundation for more than 10 years; DuPont's contribution in 2009 amounted to approximately 4% of Atlantic Legal Foundation's annual revenue. DuPont's Senior Vice President and General Counsel is a member of the Board of Directors of Atlantic Legal Foundation, but he was not consulted with respect to, nor did he participate in, the decision of Atlantic Legal Foundation to file this *amicus* brief.

STATEMENT

Public entities, consisting of various California counties and cities have for more than ten years been prosecuting a public nuisance action against numerous businesses that manufactured lead paint. After summary judgment was granted in favor of defendants on various tort causes of action initially advanced by the public entities, the complaint eventually was amended to leave the public-nuisance action as the sole claim, and abatement as the sole remedy. Pet.App. 1a. The public entities are represented both by their own government attorneys and by several private law firms. The private law firms are retained by the public entities on a contingent fee basis pursuant to agreements that generally provided for a fee to be p[aid to the private attorneys of 17 percent of the recovery. Pet.App. 4a. The private law firms will receive no fee, and the public entities will pay nothing, if the defendants prevail on the merits. Pet.App. 4a.

Defendants (petitioners here) moved to bar the public entities from compensating their private counsel by on a contingent fee basis.

The California Supreme Court acknowledged that the contingency fee prosecutors "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private

interest." Pet.App. 26a. Nevertheless., that court held that *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 705 P.2d 347 on which the defendants relied in the California courts, does not bar *all* contingent fee agreements with private counsel in public nuisance abatement actions if the contingent fee agreements between public entities and private counsel provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation. Pet.App. 37a.

Only five of the ten fee agreements between the public entities and private contingent fee counsel contain language specifying that control and supervision will be retained by the government attorneys,[3] and none of the contingent fee agreements contain the other specific provisions

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[3] The California Supreme Court opined that references in these agreements to "final authority over all aspects of the litigation" "fairly can be read to mandate that the government attorneys will supervise the work of the private attorneys, and will retain authority to control all critical decisionmaking in the case" and that the "declarations [submitted by the government attorneys and the private contingent fee lawyers] establish that such general control and supervision have been exercised and are, in fact, being exercised." Pet.App. 39a.

regarding retention of control and division of responsibility that the California Supreme Court deemed to be required to safeguard against abuse of the judicial process. Moreover, because the seven agreements that are in the record were deemed by that court to be deficient under the standard it set forth and because it could not assess the sufficiency of three agreements that were not in the record before it, the California Supreme Court reversed and remanded the matter for further proceedings consistent with its opinion, noting that the public entities could pursue the litigation assisted by private counsel on a contingent fee basis only after revising the retention agreements to conform with the requirements it set forth in its opinion. Pet.App. 39a.

SUMMARY OF ARGUMENT

The due process protections of the United States Constitution prohibits the representation of governmental units by private attorneys who have a direct contingent financial interest in the outcome of the litigation. Due process requires that government officers exercising the powers of the sovereign, and their lawyers, will be impartial and will not have a direct financial interest in the success of litigation when, as here, state or local governments act in their capacity as sovereign or as *parens patriae*.

The Fourteenth Amendment to the United States Constitution requires that those who exercise the government's powers in adjudicatory

proceedings may not have a pecuniary interest in the outcome of those proceedings. The principles of impartiality applies with equal force to the government's lawyers in civil proceedings who are held to higher standards than private lawyers because they have and overriding the responsibility to seek justice.

Private lawyers representing the government are subject to the same standards as government employees and therefore must avoid even the "potential for private interest" and who must strive "for the attainment of justice." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-06, 807, 814 (1987) (plurality opinion). Because the counties and municipalities brought the underlying actions as sovereign and in the name of the People of the State of California, the private contingent fee counsel arrangements should be disallowed because those private attorneys have an interest that conflicts with the government's overriding duty to seek justice and to create both the reality and appearance of fairness.

Although courts in some states have held that it is acceptable for the government to retain private contingency fee attorneys to prosecute civil case, so long as government attorneys retain absolute control over and "retain final authority" over litigation, and so long as the private attorneys are engaged to play a "limited, subordinate role" and are "merely *assisting*" government attorneys in the litigation, such a rule is ineffective in guaranteeing a defendant's due process rights. As a practical

matter it is virtually impossible to implement that standard without intrusive and disruptive judicial inquiry and court supervision. No amount of supervision of the private contingency fee lawyers by government attorneys and no amount of *post hoc* review of contingent fee counsel's performance by a court can cure the appearance of impropriety that exists in this case.

Even if this Court were to adopt the position, in principle, that the government can retain private contingency fee attorneys if those private attorneys are subject to vigorous supervision and control, the facts of this case militates against condonation of the contingent fee arrangement between the sovereign and the firm which has a direct contingent financial interest in the outcome of the litigation because the private law firm will, and must as a practical matter, have been given broad discretion to make or influence critical decisions about the conduct and resolution of the litigation. Indeed, some of the contracts between the government entities and the private contingent fee law firms in this case failed to give the government lawyers express ultimate control and management of the litigation.

The California Supreme Court's decision in allows governments to use contingency fee lawyers, so long as the retainer agreements recit e that government staff lawyers "control" the litigation, Pet. App. 27a-39a, but imposes no effective, practical, measures to ensure control in fact by any senior government attorney.

This Court should grant the petition to resolve a question that directly impacts the due process rights of defendants in government litigation brought to "vindicate" public interests, implicates the integrity of the judicial process and has broad effect because these instances of government litigation by private contingency fee lawyers becomes more prevalent. The issue raised in the petition is "one of extreme public importance"that is "capable of repetition, yet evades review." *See State v. Lead Indus. Ass'n*, 951 A.2d 428, 470 (R.I. 2008).

ARGUMENT

I. Due Process Prohibits Representation of Public Entities By Private Contingency Fee Attorneys.

The California public entities' contingent fee arrangement with private contingent fee law firms violates the constitutional guarantees of due process. Due process requires that government officers exercising the powers of the sovereign and their lawyers will be impartial and will not have a direct contingent financial interest in the success of litigation when, as here, the counties and municipalities act in their capacities as sovereign. The contingent fee agreements inherently create incentives that defeat the objectivity of the public entities and their lawyers.

A. Due Process Requires That Those Who Exercise the State's Power in Legal Proceedings Act Impartially and Without a Financial Stake in the Outcome.

The United States Constitution requires that criminal and civil tribunals be impartial. Those who exercise the government's powers in adjudicatory proceedings may not have a pecuniary interest in the outcome. U.S. Const., amend. XIV. This Court has been mindful of the dangers of partiality or the appearance of partiality when judges, administrators or attorneys representing the public have a pecuniary interest in the outcome of litigation brought by the sovereign. *See Tumey v. Ohio,* 273 U.S. 510, 522-23 (1927); *Ward v. Village of Monroeville,* 409 U.S. 57, 58, 60 (1972); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980); *Young v. United States ex rel. Vuitton et Fils S.A.* , 481 U.S. 787, 808 (1987).

In *Tumey,* a village mayor with authority to try those accused of violating a law prohibiting the possession of alcoholic beverages faced two potential conflicts he received a salary supplement for performing judicial duties that was funded from the fines assessed and he received the supplement only upon a conviction. Disqualification was required because "[e]very procedure which would offer a possible temptation . . . might lead him not to hold the balance nice, clear and true between the State and the accused, [and] denies the latter due

process of law." 273 U. S., at 532.[4] The *Tumey* court was concerned both with direct pecuniary interest of a judicial officer and "with a more general concept of interests that tempt adjudicators to disregard neutrality." *See Caperton v. A.T. Massey Coal Co.*, U.S. ,129 S. Ct. 2252, 2260 (2009)

In *Ward* v. *Monroeville*, 409 U. S. 57 (1972) the Court held that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." (409 U. S., at 60) The "possible temptation" the mayor might face due to his "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to the town's general finances] from the mayor's court" was enough to bring into question his impartiality. *Id.*[5] The Court in *Gibson* v. *Berryhill*, 411 U. S. 564, 579 (1973),

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[4] The *Tumey* court held that the Due Process Clause requires that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case and that this rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." Federalist No. 10 at 59 (J. Cooke ed. 1961) (J. Madison); *see* J. Frank, "Disqualification of Judges," 56 *Yale L. J.* 605, 611–612 (1947).

[5] In *Ward* v. *Monroeville* the mayor derived no direct personal gain because the fines the mayor assessed went into the town's general account.

another case that same term, held that "the [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." In *Gibson* an administrative board composed of optometrists had a pecuniary interest of "sufficient substance" such that it could not preside over a hearing against competing optometrists.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) the Court further clarified the reach of the due process clause regarding a judge's financial interest in a case, stressing that it was "not required to decide whether in fact [the justice] was influenced." *Id.*, at 825 The proper constitutional inquiry is "whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ibid.* (quoting *Ward v. Village of Monroeville, supra*, at 60, in turn quoting *Tumey, supra*, at 532). *See also In re Murchison*, 349 U.S. 133 at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end . . . no man is permitted to try cases where he has an interest in the outcome.")

Recently, in *Caperton v. A. T. Massey Coal Co., Inc.*, *supra*, this Court spoke vigorously about the need for impartiality where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," and addressed the need to have the due process clause implemented by objective standards that do not require proof of actual bias, citing

Tumey; *Mayberry* v. *Pennsylvania*, 400 U. S. 455, at 465–466 (1971); *Lavoie*, 475 U. S., at 825.

In defining the appropriate standard this Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975).

Justice Thurgood Marshall explained the rationale for this rule eloquently in *Marshall v. Jerrico, Inc.*:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U. S. 319, 424 U. S. 344 (1976). ***At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done,"*** Joint Anti-Fascist Committee v. McGrath, 341 U. S. 123, 341 U. S. 172 (1951) (Frankfurter, J., concurring). . . .
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> * * *
>
> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible

> factors into the prosecutorial decision and in some contexts raise serious constitutional questions." (citations omitted).

446 U.S. at 242, 250 (emphasis supplied).

These principles apply "with equal force to the government's civil lawyers" in civil proceedings who are held to "higher standards than private lawyers" because they "have 'the responsibility to seek justice. . . .'" *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992), citing the American Bar Association, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1981).

This Court extended these neutrality requirements -- disinterestedness and impartiality – to private lawyers representing the government, holding that they are subject to the same standards as government employees and therefore must avoid even the "potential for private interest." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-06 (1987). The exercise of the state's police power often involves "considerable discretion" and critical decisions "made outside the supervision of the court." Therefor courts "must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Id.* at 807, 814.

This Court has also viewed public nuisance actions as "akin to a criminal prosecution."

Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987), and, as the California court below recognized, is inherently brought in the public interest. ("A public nuisance abatement action must be prosecuted by a government entity and may not be initiated by a private party." Pet. App. 22a.) These cases were brought in the California courts in the name of the "People of the State of California" in their sovereign capacity and pursuant to their *parens patriae* powers,

The conflict between personal financial gain and the public interest affects how the financially interested attorney acts and the course of action he suggests to the governmental client. The conflicts also create an appearance of impropriety that undermines public confidence in the judicial process.

Application of these principles requires that a contingent fee arrangement with private counsel should be disallowed because such arrangements give outside counsel "an interest extraneous to his official function in the actions he prosecutes on behalf of the City," *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 705 P.2d 347 at 351 (Cal.1985) and it is "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 353.

The California Supreme Court's attempt in this case to distinguish *Clancy*, or to cabin it by referring to the specific characteristics of the defendant in *Clancy*, creates constitutionally untenable distinctions – at bottom creating different levels of constitutional protection based on the size and resources of the litigants.[6]

B. Contingent Fee Counsel's Substantial Financial Interest in the Outcome of This Action Prevents the Public Entities from Exercising Their Powers Impartially.

The use of private contingent fee counsel in cases of high public interest like these is inconsistent with the requirement of impartiality required by due process. Private contingent fee counsel's direct

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[6] The California court held that the need for a disinterested prosecutor in this case is less important because petitioners are "large corporations with access to abundant monetary and legal resources," Pet. App. at 23a, thus any concern "about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case." *Id.* at 24a. But this Court has held that the "[T]he wealth of a defendant cannot justify . . . otherwise unconstitutional" procedures. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) ("The fact that [defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to [due process].")

and substantial financial stake in the outcome of this litigation necessarily prevents them from seeking the overriding objective of the exercise of sovereign power – protecting the health and safety of their citizens while attaining justice. This Court has noted that a civil society under the rule of law

> must have assurance that those who would wield this power will be guided ***solely by their sense of public responsibility for the attainment of justice***. A prosecutor of a contempt action who represents the private beneficiary of the °court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters. The appointment of counsel for [a private party] to conduct the contempt prosecution in these cases therefore was improper.

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 at 814 (emphasis supplied).

The private contingent fee law firms in this case have such a direct and significant financial interest in the outcome that there is a substantial risk that they cannot be, or will not be, nor will they be perceived to be, objective and neutral. The substantial contingent fees these private attorneys may receive is creates far more than the mere possibility that the private lawyers' financial interest will determine or influence decisions that should be made by disinterested public servants,

and it thus violates due process. *See Young v. United States ex rel. Vuitton et Fils S.A.* at 805 (It is the *"potential* for private interest" that constitutes a denial of due process, "[r]egardless of whether the appointment of private counsel . . . resulted in any prosecutorial impropriety") (emphasis in original); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 at 242 (No governmental official stands to profit economically from vigorous enforcement of the child labor provisions at issue and thus there is no realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement effort).

The windfalls reaped by private contingency fee attorneys can be very substantial. *See, e.g.*, R. O. Faulk and J. S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel*, Toxics L. Rep. 170 (2006). These contingency fee arrangements frequently develop when private plaintiffs' lawyers, motivated by the possibility of lucrative damages awards, approach the government with an offer to handle a litigation at no cost to the government. *See, e.g.*, J. Beisner, J. D. Miller, and T. McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers,* 1 (2005), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=939 (last accessed 11-23-2010).

The profit motive that necessarily drives contingent fee representation casts doubt on the

impartiality and neutrality of the government's case.

The neutrality principle, grounded in due process concerns, is a formidable obstacle to contingency fee arrangements. The decision of the California Supreme Court in this case, and of other courts in similar cases[7], assumes that the government's assertion of control[8] eliminates the appearance of impropriety created by the retention as prosecuting attorneys of outside counsel with a financial stake in the outcome of public nuisance actions.

The California Supreme Court in *Clancy, supra*, did not prohibit the government's use of contingent fee agreements in all cases, but because a public nuisance action involves the vindication of public rights it is in "a class of civil actions that demands

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[7] *See, e.g., State v. Lead Indus. Ass 'n, Inc.*, 951 A.2d 428, 475-477 (R.I. 2008), *Philip Morris Inc. v. Glendening*, 349 Md. 660, 709 A.2d 1230 (Md. 1998) *City and County of San Francisco v. Philip Morris, Inc.* 957 F. Supp. 1130 (N.D. Cal. 1997), *City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238 (E.D. Cal. Nov. 20, 2007), *Sherwin-Williams Co. v. City of Columbus, Ohio*, No. C2-06-829, 2007 U.S. Dist. Lexis 51945 (S.D. Ohio July 18, 2007).

[8] The California Supreme Court sought to implement this supposed safeguard by setting forth several specific provisions that must be included in the contingency fee retainer agreements. *Id.* at 37a.

the representative of the government to be absolutely neutral" and involves a "balancing of interests," and "a delicate weighing of values" and therefore contingent fee agreements were prohibited because "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* at 352.

C. The Measures Prescribed by the California Court Do Not Ensure the Neutrality Required by Due Process

The California Supreme Court acknowledged that the private attorneys' contingency fee arrangements create "a conflict of interest that potentially places [their] personal interest at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public, rather than serving a private interest." Pet. App. 26a. The California Supreme Court nonetheless held that such arrangements were fair if they recite that government staff counsel retain ultimate control over all "critical discretionary decisions," such as the decision to settle the case, and that the supervising government counsel personally "oversee[] the litigation." *Id.* at 27a, 37a.

The theory, adopted explicitly or implicitly by the California court and other courts (*e.g.*, the Rhode Island Supreme Court in *State v. Lead Indu s. Ass'n*, 951 A.2d 428 (R.I. 2008), that a trial court can review the proceedings while they are ongoing to determine as a factual matter whether

contingent fee counsel is adequately supervised by government lawyers, and the proceedings are therefore sufficiently neutral would require a continuous and intrusive inquiry.

The California court relied on a formulation of contractual language that it mandated for the retention agreements. It placed such emphasis on the language of the agreements because a precise determination of whether and to what extent the county or city attorneys are exercising oversight is complicated. As the intermediate California appeals court recognized, it is extremely difficult to compare from the bench the decision-making authority of outside counsel to the authority retained by the attorney general. *See County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. App. 2006).

But the mere inclusion of particular words in a retainer agreement is a questionable check on the influence and power of outside counsel. It is easy for the requisite contractual language stating that the attorney general retains control and authority over the litigation to slide into mere abstractions. The California court based its holding on the assumption that the trial court can review the proceedings after they are concluded to determine as a factual matter whether contingent fee counsel was adequately supervised by the government and sufficiently neutral to justify any contingent fee that may be earned. But no amount of supervision by government attorneys and no amount of *post hoc* review of contingent fee counsel's performance can

cure the appearance of impropriety that exists in this case, where private contingent fee counsel become the government's representatives.

Reliance on the mere words of the retainer agreement is not sufficient in most cases. It is easy to include the requisite contractual formulaic language stating that the county or city attorney retains control and authority over the litigation, but these clauses may be mere abstractions. It is often extremely difficult for the court to compare the decision-making authority of outside contingency fee counsel with the authority retained by the government officials. The mere inclusion of particular words in a retainer agreement is a questionable check on the influence and power of outside counsel. Even government officials' promises that they will retain complete control over the litigation lacks concrete value and provides no real assurance that public policy concerns and the interests of justice will be given priority over recovering monetary damages.

The mere inclusion of partic ular words in a retainer agreement is a questionable check on the influence and power of outside counsel. Although the California court prescribed altered language as sufficient proof of a changed relationship, the notion that a retainer agreement, however expressed, seems highly suspect. It is easy to draft the requisite contractual language stating that the county or city attorney retains control and authority over the litigation, but without experienced public attorneys and the expenditure

of considerable effort, the words of the retainer agreement are likely to be mere abstractions. Mere verbal assurances that a senior attorney in the county's or city's law department "actively participates" in the action, that the city or county attorney is the "attorney of record," and that the contract with the private contingency fee lawyers makes it abundantly clear that the public entity retains complete control over this litigation" are not adequate Such statements lack concrete value and provide no real evidence that public good will be given priority over recovery of monetary damages.

The theory, adopted explicitly or implicitly by some courts, that a trial court can review the proceedings while they are ongoing to determine as a factual matter whether contingent fee counsel is adequately supervised by government lawyers, and the proceedings are therefore sufficiently neutral would require a continuous and intrusive inquiry. Obtaining the information necessary to test sufficiency of control would be exceedingly difficult, if possible at all. If a "subordinate lawyer" exception were to be adopted, the parties would then engage in factual disputes regarding the sufficiency of control exercised by the government "supervisor." What makes this result even more problematic is that the *defendant* would have the burden of policing the relationship between the government entities and their contingent fee counsel. Government plaintiffs would most likely attempt to withhold any evidence indicating a lack of proper control on grounds of attorney-client privilege and work product protection. This Court

has recognized the impossibility of monitoring a conflict of interest once it is found. *See Young v. United States ex rel. Vuitton* 481 U.S. 787, 812-813 (1987)(plurality opinion):

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are *part* of the record.

(emphasis in original).

The problem with the decisions which rely on contractual language to preserve a defendant's due process rights is that they fail to confront some difficult, but vital, practical issues: (i) whether the professed control over the litigation is actually asserted is almost impossible to determine, (ii) the appearance to the public of an improper financial motive is not eliminated by government reassurances that "we're still in charge," and (iii) regardless of the extent of government control, the contingent fee counsel's profit motive necessarily colors, and therefore corrupts, the day to day decision-making required in the prosecution of any case, including one on behalf of the government.

Ultimately, we submit, no amount of ostensible "control" can mask the fact that, unlike the government, contingent fee counsel are "in it for the money."

The ability or willingness of the government entities to monitor in detail and control the daily activities of outside contingency fee lawyers is in doubt. Indeed, in this case and others, it is precisely the public agencies in-house staffs' asserted lack of requisite knowledge and unwillingness to expend in-house attorney time to litigate these cases that led them to retain private contingency fee lawyers in the first place.

Moreover, how would a trial court and the defendants ever be able to discover the facts necessary to make a determination whether tactical and strategic decisions were not made with the contingency fee lawyers' bottom line paramount? Obtaining the information necessary to test sufficiency of control would be exceedingly difficult, if possible at all. If a "subordinate lawyer" exception were to be adopted, the parties would then engage in factual disputes regarding the sufficiency of control exercised by the government "supervisor."

What makes this result even more problematic is that the *defendant* would have the burden of policing the relationship between the government entities and their contingent fee counsel. Government plaintiffs would most likely attempt to withhold any evidence indicating a lack of proper

control on grounds of attorney-client privilege and work product protection.

This case is clearer, because several of the government entities had not even verbally reserved to themselves the right to control the litigation. This, we submit, is some indication that they have no desire to get involved in the "nuts and bolts" of the litigation, or to rein in the private contingent fee lawyers they hired. The mere drafting of a formulaic clause in the retainer agreement asserting that the county or city client has "ultimate control" is not an adequate safeguard.

Moreover, the reality is that a contingent fee arrangement such as those here eliminates an important economic constraint – cost – on the pursuit of marginal cases. Because cases by litigated on behalf of the public entity by private contingent fee lawyers are essentially free of cost or risk to the public entity client, there is no meaningful counterbalancing element when the public entity is weighing the decision to sue, the decision to discontinue the case, or the decision to settle for nominal damages.

The impetus that induced the public entities to enter into contingent fee arrangements, to minimize or eliminate the cost to themselves of bringing these lawsuits, is likely to induce them to expend little time or effort in monitoring the private contingent fee lawyers.

We do not suggest that public entities cannot retain outside counsel with particular expertise that their own legal departments lack. Indeed, they do so on a regular basis, without contingency fee arrangements.

Any contention that th e retention of private *contingent fee* counsel is the only, or best, way for the public entities to achieve "abatement" is, we submit, without merit. The counties and cities can obtain effective representation without a contingent fee arrangement that creates unlawful incentives to win instead of to seek justice. They can, of course, use their own lawyers. Alternatively, if despite their own extensive capabilities, they nonetheless believe they need expertise they do not have, they can hire private outside lawyers on an hourly or flat rate basis. In short, there was no necessity for the public plaintiffs to compromise the their impartiality and integrity, or the public interest, by retaining private contingent fee lawyers.[9]

We respectfully submit that the arrangement between the public entities and the private

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[9] In the private sector "many companies have described a preference for implementing fixed or retainer fee arrangements, and commented on how this type of fee arrangement helps to promote better alignment with in-house law department economics." Association of Corporate Counsel, LEADING PRACTICES IN STRATEGIC OUTSOURCING AND ALTERNATIVE SERVICE MODELS: WHAT COMPANIES ARE DOING at 4 (2004).

contingency law firms in this case, even as prescribed by the California Supreme Court, does not satisfy the due process requirements of the United States Constitutions because contingent fee counsel's profit motive necessarily colors, and therefore corrupts, the day-to-day decision-making required in any case brought in the name of the public.

CONCLUSION

The petition for a writ of certiorari should be granted.

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